

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 374 of 2000

with

CRIMINAL APPEAL No 582 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and

HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

KISHOR KOTUMAL VANJANI SINDHI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 374 of 2000
MR LM CHHABLANI for the appellant.
MR ND GOHIL, APP, for the Respondent.
 2. Criminal Appeal No. 582 of 2000
MR ND GOHIL, APP, for the appellant.
MR LM CHHABLANI for the respondent.
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CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS

and
HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 23/12/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE A.L.DAVE)

1. These two appeals arise out of a judgment and order rendered by learned Additional City Sessions Judge, Court No.7, Ahmedabad, in Sessions Case No.343 of 1998, on 23rd March, 2000, convicting Kishore Kotumal Vanjani Sindhi for offences punishable under Sections 376, 306 and 452 of the Indian Penal Code. The convict was sentenced to rigorous imprisonment for a period of 10 years and to pay a fine of Rs.2000/-, in default, to undergo further rigorous imprisonment for a period of three months for offence punishable under Section 376 of I.P.C. Identical punishment was inflicted for offence punishable under Section 306 of I.P.C. The convict was ordered to undergo rigorous imprisonment for one year and to pay a fine of Rs.1000/-, in default, to undergo further rigorous imprisonment for a period of 15 days for offence punishable under Section 452 of I.P.C. It was ordered that the substantive sentences shall run concurrently.

2. Aggrieved by the said judgment and order, the convict has preferred Criminal Appeal No.374 of 2000 on various grounds, whereas the State has preferred Criminal Appeal No.582 of 2000, for enhancement of sentence.

3. The facts of the case, in brief, can be stated thus:

3.1 Complainant-Nilesh Dattatrey Sawant of Kailashnagar, Near Rashtra Bharti Hindi School, Hatkeshwar, Amraiwadi, Ahmedabad, is engaged in goods rickshaw driving. He was married to Anjana alias Anju and from the wedlock, they had two children, namely, Trupti and Amit. The complainant has a brother, named Dinesh. His father is Dattatrey T. Sawant and their houses are located nearby each others' house. On 26th April, 1998, as per the say of the prosecution, the complainant started with his goods rickshaw for his daily routine work in the morning around 9.00 - 9.30, while his wife was at home. After some time, father of the complainant-Dattatrey came to the house of the complainant in a routine manner for a cup of tea, was there for some time and, on being told by the wife of the complainant, i.e. Anju, that he was required by her mother-in-law at the house of Dinesh, he left for

Dinesh's house. After he reached Dinesh's house, son of the complainant came to him after some time and informed that his mother-Anju has gone to purchase vegetables. After some time, a need for kerosene arose in the house of Dinesh and his mother went to the house of her other son-Nilesh for kerosene. Within a short while, she came back and informed Dattatrey that Anju is not at her house and that there are writings on the wall requesting "Anna", mother of the complainant to take care of the children and Kishore Sindhi and two persons had come and raped her and that she is going to jump into Kankaria. Dattatrey and others, therefore, went to the house of complainant-Nilesh, saw the writing and then went to the house of Anju's parents to intimate them about the incident. Anju's father came after about an hour and said that inquiry (search) has to be made. Dattatrey informed Dinesh about the incident who, in turn, went to inform the complainant-Nilesh, ordinarily, plying his rickshaw at Narol Chowkdi. The complainant, therefore, started off for home, enroute visiting Kankaria and houses of other relatives. After reaching home, he also saw the writing on the wall and then went to lodge a complaint. The police, however, refused to register a complaint asking him to wait for some time and if the lady is not found, a complaint would be registered.

3.2 Parallel to this, at around 10.30 A.M., one Babu Arjan, who works on a Pav Bhaji stall near Kankaria, noticed a lady in the waters of Kankaria. He, therefore, removed the lady from the water and took her to L.G. Hospital, at Maninagar, for treatment. It is the case of the prosecution that, treatment was given to her, but in vain and the lady, ultimately, died. The dead body was sent for postmortem. In the meantime, the complainant was successful in getting the complaint registered and, on receiving this information about the lady having been found from Kankaria, identification was got done and it was found that the dead body was that of Anjana alias Anju. On basis of the F.I.R., offence was registered, investigation made and charge sheet filed.

3.3 The father of the deceased lodged a private complaint for offence punishable under Section 306 of I.P.C. against the complainant, alleging ill-treatment at the hands of the complainant to the deceased-Anju, forcing her into commission of suicide.

3.4 Both the cases were registered as Sessions Cases and were tried by the same learned Judge and decided on the same day, though by different judgments.

3.5 In the case against Kishore Sindhi, charge was framed at Ex.2 and he pleaded not guilty to the charge. The Trial Court, after considering the evidence on record, concluded that the prosecution was successful in establishing the charges against him and recorded the conviction and sentence, as stated above, which has given rise to these appeals.

3.6 So far as the case against the complainant on basis of the complaint by the father of the deceased, the accused, i.e. the present complainant, came to be acquitted by the Trial Court. That judgment and order is not challenged and has attained finality.

4. We have heard learned Advocate, Mr. Chhablani, for the accused in both the appeals as well as learned Additional Public Prosecutor, Mr. Gohil, for the State.

5. Learned Advocate, Mr. Chhablani, has taken us through the record and proceedings and has raised the following contentions :-

- (1) There is delay in lodging of F.I.R. of about 15 hours.
- (2) The writing on the wall cannot be considered as a dying declaration. Even if it is considered as a dying declaration, it is not a writing by the deceased herself.
- (3) The opinion of the handwriting expert is not correct and genuine. He has gone to the place without any Yadi from the Investigating Officer and, therefore, he is an interested witness and his version cannot be accepted.
- (4) There is no positive evidence as to gang rape. There are no external injuries. The bangles are more or less intact and that the accused has not been medically examined. He submitted that, added to these factors is the fact that no semen stains were found.
- (5) It is contended that, postmortem was performed between 6.00 P.M. and 7.00 P.M. in the evening of the day of incident. It is a matter on record that the dead body was identified at a much later point of time around midnight and despite this, the postmortem notes contained name of the deceased. It is, therefore, contended that the investigation is doubtful.

- (6) Important witnesses are not examined by the prosecution. He submitted that the parents and children of the deceased are not examined as witnesses. Only the in-laws of the deceased have been examined. No independent witness from neighbourhood has been examined. The witness, Babu Arjan, who took out the deceased from Kankaria lake, has also not been examined. The doctor, who first treated the deceased the deceased at the L.G. Hospital has also not been examined. Non-examination of these witnesses by the prosecution would reflect that the prosecution is keeping back some material which may not be favourable to the prosecution and, therefore, an adverse inference may be drawn.
- (7) It is contended that the F.S.L. report is not against the accused as far as rape is concerned.
- (8) Mr. Chhablani submitted that, if the evidence is closely seen, the offence could not have been committed at the time and in the manner it is alleged. He has taken us through the deposition of P.W.1-Nilesh Sawant, P.W.2-Dattatrey Sawant and P.W.5-Dinesh Sawant to indicate that around the time when the offence is alleged to have taken place, there must be somebody with the deceased from the family and, in that eventuality, the story of rape is only a concoction.
- (9) It is contended that the accused is made a scapegoat of a conspiracy of the complainant's side. The only attempt is to rope in the accused, which is reflected even from the writing on the wall. Mr. Chhablani placed reliance on certain decisions of the Apex Court as well as other High Courts and submitted that the case against the appellant cannot be said to have been established beyond reasonable doubt. The benefit ought to have been given to the accused.
- (10) Learned Advocate, Mr. Chhablani, submitted that, so far as the appeal by the State is concerned, there is no substance. The accused has been inflicted with the highest punishment prescribed by law. The order of sentence passed by the Trial Court is reasoned one and there is nothing to indicate that the Trial Court has acted arbitrarily or that the discretion is not used

properly. Mr. Chhablani, therefore, submitted that the appeal by the accused may be allowed and the appeal by the State may be dismissed.

6. Learned Additional Public Prosecutor, Mr. Gohil, has opposed the appeal by the accused. He submitted that a gruesome incident had occurred and there is ample evidence to implicate the accused. He submitted that the accused is known to the family of the complainant and was in the habit of making passes at the deceased, of which she had complained to her father-in-law. This fact emerges from the evidence of father-in-law, Dattatrey, as well as brother-in-law, Dinesh, of the deceased and has remained uncontroverted and unchallenged. The writings on the wall indicate that the accused along with others suddenly entered the house and ravished the deceased. The deceased was in a very bad state of mind because of post-rape trauma and in that only, she committed suicide. Her conduct is natural. She has done what she had written on the wall. She has written on the wall requesting Anna to take care of her children and sends her son to the house of Dinesh and then she leaves the house and jumps into Kankaria to commit suicide. She is rescued from Kankaria lake. She, in terms, implicated the accused of the charge of rape and has indicated that she is jumping into Kankaria lake. Therefore, Mr. Gohil, submitted that, it is true that there is some discrepancy in the timing aspect emerging from evidence of prosecution witnesses, but is not such as to render the depositions unreliable. Mr. Gohil submitted that there is medical evidence to support the case of the victim-Anju and that neither the deceased nor the doctor had any reason to falsely implicate the accused. Mr. Gohil submitted that, non-examination of witnesses will not affect the prosecution case for the simple reason that the evidence already on record does not stand abrogated thereby. The fact remains that, after writing on the wall, the deceased jumped into Kankaria and committed suicide. The fact also remains that, by way of the writings on the wall, the deceased had implicated the accused. Mr. Gohil submitted that the father of the deceased had lodged a private complaint, on the basis of which a Sessions Case was registered, wherein the complainant is alleged to have acted cruelly with the deceased and to have abated the commission of suicide. But, in that case, the accused persons have been acquitted. That order has attained finality as no appeal is preferred against it. In other words, according to Mr. Gohil, there is a verdict of the competent Criminal Court not accepting, as true, the allegations against the complainant and other persons, the accused therein. This

would rule out the possibility of the writing on the wall being made subsequently. Mr. Gohil submitted that none of the contentions raised by the learned Advocate for the accused can help the accused. He, therefore, submitted that the appeal by the accused may be dismissed.

6.1 So far as the appeal by the State is concerned, Mr. Gohil submitted that here is a case where the accused is involved in two serious offences. He has committed rape on a young married lady, causing her to commit suicide and, therefore, no sympathy could have been shown by the Trial Court nor there is any need to show sympathy towards the accused. Mr. Gohil submitted, therefore, that the appeal by the accused may be dismissed and the State's appeal may be allowed.

7. We have given a thoughtful consideration to the contentions raised before us by both the sides in light of the evidence on record.

8. P.W.1-Nilesh Dattatrey Sawant (Ex.8) is the complainant, who was the husband of the deceased. He says that he was staying at Kailashnagar around the time when the incident occurred. His parents were staying in Bhagwatinagar. He was earlier staying in that very house with the parents, but he had shifted to Kailashnagar before some time. It transpires that both Kailashnagar and Bhagwatinagar are located near Hatkeshwar Temple in Amraiwadi area. The witness says that, he knows accused-Kishore Sindhi.

8.1 On 26th April, 1998, the complainant left the house along with his loading rickshaw around 9.30 A.M. When he reached with the rickshaw around 2.00 P.M., at Narol, his brother-Dinesh came and told him that his wife is not in the house and that name of Kishore Sindhi is written on the wall. Therefore, he left with the tempo and went to his house after taking a round of Kankaria lake. On reaching home, he found that his sister-in-law (wife's sister) was standing outside the house. He entered the house and found a writing on the wall, which can be translated in English thus:

"Kishore Sindhi and two Goonda like persons raped me gagging my mouth after suddenly entering into the house and they went away. Prosecute Kishore Sindhi - Anju"

On the side of the wall, it was written "I am going to jump into Kankaria". On the other wall, it was written "Aye and Anna, Take care of Trupti and Amit, Bhau, take

care of Trupti and Amit". According to this witness, the writings were in the hands of his wife, which he could identify. He says that the colour of the wall was white and the writing was with coal. He says that, after reading this, he immediately went to his in-law's house just to inquire if, by chance, his wife is there, but she was not there and the in-laws were scared. He says that he told his father-in-law that this is a police case and he is going to prosecute. His in-laws told him not to go for police case. Whatever has happened has happened. However, he went to Amraiwadi Police Station, but his complaint was not recorded. Thereafter, he went to his brother-in-law, Vijaykumar's house, but he did not find Anju there. Then he went to Bhagwatinagar, where also he did not find Anju. By that time, it was 10.30 P.M. He, therefore, went to his in-law's house, where his brother-in-law (wife's brother), Manish, who had then come from Civil Hospital told him that Anju is no more. The witness told Manish that this may not be so and Manish told the witness that he had himself seen with his eyes and that Manish's father is at Kagdapith Police Station and has called everybody (from the family). The witness says that, then he went to the Police Station, where his complaint was recorded. He identifies the muddamal articles No.8, 9 and 10, which the clothes of the deceased. He identifies the handwriting of his wife on the post card, inland letter, Dipavali Card, etc. and states that the handwritings are of his wife-Anju on those documents. He identified the ear rings, bangles, etc. as that of his wife.

8.2 The witness has been cross-examined. He says that, on 26th April, 1998, when he went out, he took the rickshaw by a circuitous route. He says that he cleans his rickshaw before leaving for work. He says that, if somebody known meets him on the way, he waves at him. On that day, he did not find any person till he reached the main road. He learnt about his wife, for the first time, around 2.00 to 2.30 P.M. on the 26th, through his brother. His brother had also told him about the writings on the wall regarding Kishore Sindhi. He says that he was scared when he learnt that his wife had gone to jump into Kankaria. He has been put many questions regarding his movement after his having come to know about the missing of his wife from the house. He denies the suggestion that his relationship with the deceased were not good and that he use to quarrel with her and use to beat her and ill-treat her. However, he was candid enough to admit that, at times, there were petty quarrels. He denies that, on 25th April, 1998, he had quarrelled with his wife and had beaten her. He also

denies that neighbours had gathered and cooled him down on that occasion. He also denies that on the 26th, when he got up in the morning, his wife was not in the house. He denies that this wife had left the house because of his torture.

8.3 The witness says that he reached Kagdapith Police Station around 10.30 to 11.30 P.M. At that time, his father-in-law, his brother-in-law, sister-in-law, etc. were present. Police had made inquiries and then the complaint was recorded.

8.4 The witness admits that his father-in-law has lodged a complaint against him, his brother and his father for offences punishable under Section 498-A and 306 of the Indian Penal Code. He denies the suggestion that the present case is concocted by him by way of defence in the complaint against him.

9. Witness-Dattatrey Tanajirao Sawant is examined at Ex.9. He is the father of the complainant and father-in-law of the deceased. He says that, about 2-3 months prior to the incident, deceased-Anju had told him that Kishore is making passes at her, when she goes out. She says that she told Anju that they would go to another house and, therefore, Nilesh shifted to Kailashnagar house on rental basis. He says that the matrimonial life of Nilesh and Anjana was good.

9.1 The witness says that, on 26th April, 1998, he was at his residence till 8.30 A.M. Thereafter, he went to the house of Anju for tea, etc. around 9.00 A.M. He noticed that the house was disorderly with sarees, etc. scattered in the house, which was uncommon. He, therefore, inquired about it from Anju, but she did not give any reply. After having a cup of tea, he was relaxing on a cot when Anju told him that Anna is calling him at Dinesh's house. He told her that he has just come from that house and then he relaxed in the house. He says that Anju told him that she is not going to wash clothes. He says that, thereafter, Anju went to take bath. After she took bath, he went to the house of Dinesh. Thereafter, after some time, Amit, son of Nilesh, had come and told him that mother has gone for purchasing vegetables and has asked him to remain with the grandfather. He says that, after some time, kerosene was required in the house of Dinesh and, therefore, his wife went to the house of Nilesh to get kerosene. She immediately came back and told them that Anju is not in the house and there are writings on the wall in the house of Nilesh. He, therefore, immediately, went there. He

says that his wife and Dinesh also came there. He reiterates the writings on the wall. He then went to the house of Anju's father along with his wife-Asha to inform them about the incident. He says that Anju's sister accompanied them in the auto rickshaw. Thereafter, after about an hour, Anju's father came and said that inquiry is to be made. He says that Dinesh went to call Nilesh and Nilesh arrived around 4.00 P.M. He says that he cannot say the exact timings. He says that he remained in the house and others went to inquire about Anju. He says that police came to his house around 12.00 midnight and they were informed that Anju had committed suicide by jumping into Kankaria lake. He identifies Kishore Sindhi as the accused in the Court. He says that he knows him because he stays in Bhagwatinagar and he is usually to be found on the Pan Galla.

9.2 The witness is cross-examined. He says that, after going to Nilesh's house, he was there for about 15 to 20 minutes. He says that it had not happened that he dosed off for a long time. He says that while he was in the house, no one had come to the house. He says that the house of Dinesh is at a distance of about 5 to 6 minutes walk. He says that about half an hour prior to his reaching the house of Nilesh, his wife (Nilesh's mother) had gone to the house of Nilesh. He says that a time of about 10 minutes may have passed between Anna going to the house of Nilesh and returning to him and all of them again going to the house of Nilesh. He says that he cannot write Gujarati script but can read the same. He denies suggestions regarding quarrels and disputes between Nilesh and his wife. He also denies that Anju had, in past, left the house because of harassment at the hands of himself, his wife and sons. He denies the suggestion that when he reached the house of Nilesh in the morning of 26th, Anju was not there. He states that police had recorded his statement. He says that police had apprehended him about eight months after the incident but not on the day of the incident. He denies that he is falsely supporting the case of his son-Nilesh.

10. The next witness is Sursinh Madhavsinh (Ex.10), who is the Police Photographer, who claims to have taken the photographs of the writings on the wall. He has been cross-examined, but nothing turns on that.

11. The next witness, Rajesh Radheshyam Tiwari (Ex.12), the Panch witness, has turned hostile to the prosecution case.

12. The next witness is Dinesh Dattatrey Sawant,

brother of the complainant and brother-in-law of the deceased, who is examined at Ex.13. He says that he knows Kishore Sindhi with his usual place of sitting. He says that, on the day of the incident, while he was sitting on the benches, on the main road near Rashtra Bharti High School, at about 11.00 A.M., his father came and told him that his sister-in-law is not in the house and that it is written in the house that she is going to jump into Kankaria. He was told by his father to inquire about his sister-in-law. He, straightaway, went to Kankaria and made inquiries, but could not find his sister-in-law, deceased-Anju. He, therefore, went to his house and then to his sister-in-law's house where he found about 8 to 10 persons standing outside the house. He then went and closed the door. Then he asked his mother to go and call the parents of the deceased and, around 12.00 noon, mother and sister of the deceased and his mother came back. He says that the writing was shown to them. Thereafter, he and Rekha went to telephone the relatives. The witness says that he went to inform his brother after taking a round at Kankaria. He says that his brother's complaint was not taken by police and was told to make inquiries for about 24 hours, whereafter, complaint will be recorded. He says that around 7.30 to 8.00 in the evening, he went to the parental house of his sister-in-law. The in-laws of his brother were present. Son of the deceased was also present and when he inquired from him as to what had happened, he told him that when he was going to the latrine, he had noticed his mother writing something on the wall and he was asked by her to go to the grandfather. He says that, while she was going out, the boy wanted to go with her and, therefore, he was given snake and ladder game by her and was sent to grandfather's house. The witness also says that about two years prior to the incident, his sister-in-law had told him that Kishore Sindhi is teasing her and, at that time, they let it go. He says that about one and a half to two months prior to the incident, the deceased had again told him that Kishore Sindhi is making passes at her. He says that, he, therefore, told Dinesh Tiwari, who is a common friend of Kishore Sindhi and the witness, to tell Kishore Sindhi that he should refrain from such activities.

12.1 The witness has been cross-examined at length. He says that when he was summoned by his father, Painter-Chudasman was sitting with him. None else was there. He says that, for making inquiries, he first went towards the zoo. He says that he made inquiries from persons sitting on the parapet around Kankaria and inquired whether they had noticed any lady committing or

attempting to commit suicide. But no information was received. He says that he did not inquire from any of the stall holders. A detailed cross-examination is made about his vocation and his brother's vocation, but nothing turns on that. He denies suggestion that there were quarrels between his brother and the deceased and that, as a result, the deceased used to go away to her parental house. He also denies that he is himself in the habit of drinking and that because of that, there were quarrels in the house. He also denies that because of that, the deceased and her husband were required to stay separately. Several contradictions from his police statement were put to him (however, it would be appropriate to note, at this stage itself that the contradictions have not been proved through the deposition of the Investigating Officer). The witness denies the suggestion that his brother used to ill-treat the deceased and that because Kishore Sindhi is a leading person of the area, the deceased used to complaint all these facts to Kishore Sindhi.

13. Witness-Jagdishbhai Jethabhai Patel, who is a handwriting expert working with the Handwriting and Photographic Bureau of the Gujarat State as Assistant Handwriting Expert, is examined at Ex.35. He says that he was approached by police personnel from Amraiwadi Police Station on 29th April, 1998 and a demand for a photographer was made. He, therefore, went to the house in question along with the police officers and two Assistant Photographers, namely, Kumar D. Shah and R. B. Patel. He says that he noticed the writings on white washed walls written with coal. He says that photographs were taken under his supervision and direction by Kumar D. Shah. The handwritings were compared. He produces the photographs at Ex.37. He says that he received natural documents written by the deceased from Police Inspector, Amraiwadi, vide his outward No.1040/98 dated 3rd June, 1998. He says that the photographs of all those documents were also taken and enlarged. The admitted writings as well as the writings on the wall were compared scientifically and, after considering the proportional size, gap between letters and words, gap between two lines, writing modality, lifting of pen, strokes, curvatures, etc. opined that the writing on Ex.39 to 43 and 47 to 53 were of the same person.

13.1 This witness has been cross-examined. He admits that the science of handwriting is developing. He says that there may be writings which may be apparently similar. But there may be basic differences. He also states that, if there are two experts and if their

knowledge is identical or similar, their opinion would also be identical or similar.

14. Another important witness is Dr. Hasumati Ranchhodlal Patel, who had performed postmortem on the body of the deceased. She is examined at Ex.60. She says that she was working with Civil Hospital and on 26th April, 1998, the dead body of an unknown woman was brought for postmortem. The dead body of the unknown lady was later indicated by the police as that of Anjana Nilesh Sawant, aged about 30 years. She says that, she had performed the postmortem and prepared the report. Apart from other things, she states to have noticed swelling and redness on the external genitals. She expresses the opinion that, if the deceased was raped, there could be presence of redness and swelling on external parts of the genitals. She has been cross-examined, where states that that there could be other reasons for the redness and swelling on the genitals.

15. Witness Naranbhai Dudhabhai Rohit is examined at Ex.61. He was P.S.I. with Kagdapith Police Station on 26th April, 1998. He says that a Wardhi was received by the P.S.O. from L.G. Hospital at about 11.15 A.M. on 26th April, 1998, that a woman had fallen into the Kankaria and she has been taken out from the water by one Lariwalla and brought to L.G. Hospital. A copy of the same was prepared by the P.S.O. and sent it to the witness for investigation. The witness says that, he, therefore, went to the P.I. and told him about the incident. He says that then he went to the hospital and met the doctor. The doctor told him that the patient is unconscious. He says that this was given to him in writing. The witness, therefore, returned to the Police Station and went home as his duty was over. He resumed his duty at 8.00 P.M. and was informed that the lady had expired and that P.S.I.-Jhala drew the Inquest Panchnama. He then obtained the relevant papers. At about 12.00 midnight, some persons came to him and told him that they wanted to see the dead body recovered from Kankaria. He, therefore, went along with them to the mortuary at the Civil Hospital, where the dead body of the deceased was identified by her father, Shankerrao Harirao Saluke, as that of his daughter Anjana alias Anju. Nilesh wanted to lodge an F.I.R. The witness says that the complainant told him that the complainant's wife, before committing suicide, had written on the wall of the house that Kishore Sindhi had raped her and that he should be prosecuted. The witness says that, he, therefore, went along with the complainant to the house of the

complainant to see the place. He says that, when he had first gone to the hospital, he had seen the lady and noticed that she was not in a position to speak. The witness has been cross-examined. He admits that, he has no knowledge as to what had happened at the L.G. Hospital when the patient was taken to the Hospital initially. He says that he had recorded statement of Babubhai Arjanbhai, wherein he had stated that, "she was conscious, but was not in a position to speak". Nothing more than this is revealed in the cross-examination of this witness.

16. The next witness is P.I., Ahmedbbhai Babubhai Kureshi (Ex.63), who was the Investigating Officer. He gives details about the investigation carried out by him in his examination-in-chief. He has been cross-examined about having obtained the accused on police remand about behaviour of Kishore Sindhi that may have come to his knowledge during investigation, but nothing material turns on that.

17. With the above evidence on record, case will have to be now examined in light of the contentions raised before us.

17.1 The first contention is regarding delay in lodging of F.I.R. by approximately 15 hours. Attention is drawn to deposition of P.W.5, where it is indicated that Dinesh had knowledge about the incident at 11.00 A.M. Obviously, mother of Dinesh and father of Dinesh-Dattatrey Sawant had knowledge about the incident prior thereto. It is stated that, despite this, the F.I.R. is lodged after midnight in the early hours of the next day around 2.00 A.M. In this regard, it would be appropriate to note that, as per the say of the complainant and his brother-Dinesh, the complainant had approached the Amraiwadi Police almost immediately on learning about the incident and after initial search for his wife, but the police refused to accept the complaint asking him to make further inquiries and wait for one day and, thereafter, the complaint would be accepted. This aspect has remained undisputed. It is also a matter on record that it was only around 10.30 to 11.00 P.M. that the complainant and the relatives came to know about the death and dead body of the deceased and almost immediately thereafter, the complaint is lodged. Considering the sequence in which the incident has occurred and the sequence in which the action is taken, we do not think that the delay, if any, is so inordinate or unexplained that it would affect the veracity of the prosecution case. The man who had left for job leaving

behind a family in normal condition, if he comes to know suddenly about his wife being raped and she having committed suicide, as a trauma therefrom, would himself be disturbed and the line of action that he has taken cannot be considered as unnatural. He goes to Kankaria, he goes to his relatives' house in search of his wife, but, unfortunately, he is not able to find her out. He goes to police where his complaint is refused to be recorded and is asked to wait for some time. This also does not seem to us to be unnatural in the prevailing circumstances and, therefore, in our opinion, the time lag between the knowledge and the lodging of complaint is reasonably explained by the prosecution and we do not find any substance in this contention.

17.2 As regards the writing on the wall by the deceased, the first contention is that it cannot be regarded as a dying declaration. It was contended that the writings are in the form of a direction to prosecute the accused and not to leave him and, therefore, it cannot be considered as a dying declaration. However, having regard to the writings as a whole and considering it in light of the provisions of Section 32 of the Indian Evidence Act, we are of the opinion that the writings on the wall have to be treated as a dying declaration because it is a writing as to the cause of death of the deceased. The writings, in terms, indicate that a rape was committed and, therefore, she goes to jump into Kankaria and, in fact, she has jumped into Kankaria. Therefore, it is very conspicuous that it relates to the cause of death. The contention cannot be accepted also for the reason that the writing in piece meal cannot be read. It has to be read as a whole. A sentence from the writing cannot be taken out while appreciating the nature of writing as a whole. It also cannot be overlooked that the writing was made probably soon after the incident of rape and the author must be under physical and mental trauma leading her to decide to end her life. These aspects, taken into consideration, clearly indicate that the writings on the wall are in the nature of dying declaration.

17.2.1 So far as handwritings are concerned, it is contended that the opinion of handwriting expert is not worth acceptance for the reason that he has visited the place without any Yadi from police and, therefore, he is an interested witness. At attempt was made by learned Advocate for the accused-appellant to show that the opinion expressed by the handwriting expert is not correct. The writing on the wall and the undisputed writing of the deceased were sought to be compared before

and by us to demonstrate that they are not of the same person. We do not find much substance in this contention for the reason that the handwriting expert is a Government servant and will have no interest for or against the accused. He has stated that he was directed by the police to visit the place, take photographs and give opinion and that is how he has taken the photographs and given the opinion. It is too far fetched to read any motive in this witness against the accused.

17.2.2 So far as the other contention regarding the dissimilarity in the writings on the wall and the admitted writings, we have ourselves examined the writings from the angle suggested by the learned Advocate for the appellant with magnifying glass and we are not able to agree with the contention. We have also examined the report of the handwriting expert, the factors that he has considered while giving the opinion and the reasons for arriving at the conclusion that the handwritings on the wall and the admitted documents are of the same person and we do not find any reason to doubt or disbelieve his expert opinion. We are not able to accept this contention for the foregoing reasons.

17.3 It was contended that the writing on the wall are, subsequently, got up in order to create a defence in a complaint lodged by the father of the deceased against the present complainant, his brother and his father. This also is not possible to be accepted for the reason that the complaint by the father of the deceased was lodged, subsequently. In fact, the evidence indicates that soon after it was noticed that the deceased is missing from the house, the parents of the deceased were summoned and they had also seen the writings on the wall. At that point of time, the complaint by the father of the deceased was non-existent. It would also be relevant to note that following that complaint, Sessions Case No.232 of 1999 was registered and tried by the Sessions Court and acquittal is recorded by the Judge, meaning thereby that no substance was found in the complaint. This contention, therefore, that the writing was got up subsequently for creating defence in the complaint against the present complainant, his brother and father is without any substance and cannot be accepted.

17.4 The next contention was regarding medical evidence. It was contended that there is no positive evidence as to indicate rape as there is absence of any external injury on person of the deceased. It was contended that no semen stains were found during investigation either from the clothes of the deceased or

from other places. The bangles on person of the deceased were found to be intact and, last but not the least, there is no medical examination of the accused. It was also contended that the evidence of the doctor regarding redness and swelling on external genitals of the deceased is accepted to be possible by other factors also. It was also contended that these findings were not recorded in the Inquest Panchnama and, therefore, there is total lack of evidence to indicate rape as suggested in the writings on the wall and, therefore, the writings on the wall cannot be accepted for want of corroborative medical evidence.

17.4.1 It is true that the Inquest Panchnama is silent about redness and swelling on external genitals of the deceased. But, at the same, the doctor has noticed this while performing postmortem and has recorded the same in the postmortem report. It cannot be overlooked that the Inquest Panchnama (Ex.14) was prepared by Panchas who are laymen and it was drawn in presence of Executive Magistrate and they may not have noticed the redness and swelling that a medical person would find on examination. There is no reason to doubt the findings of the doctor about redness and swelling on external genitals of the deceased.

17.4.2 Now, considering the question whether the finding of redness and swelling on external genitals is indicative of rape or not, the doctor has stated that such indications are found if any rape is committed on the deceased. During cross-examination, the same witness says that redness and swelling on external genitals can be for many reasons. It was, therefore, contended that this is not a conclusive evidence about rape. Having considered the evidence as a whole, we find that the doctor has found the symptoms indicative of rape on person of the deceased. It is true that there can be many factors for such redness and swelling, but, in the facts and circumstances of the present case, it cannot be overlooked that the deceased has, in clear words, indicated that she was raped by the accused and two other persons and, therefore, she is going to jump into Kankaria. She has, in fact, plunged into Kankaria and given her life. This dying declaration followed by her action (conduct) of committing suicide gives it the taste of truth in absence of any other tangible or even remote reason for committing suicide. A mere doubt sought to be thrown by obtaining an admission that redness and swelling can be for other reasons does not appear to us to be reasonable or acceptable. There is nothing to doubt or disbelieve the dying declaration in nature of

writings on wall regarding rape on the deceased by the accused.

17.5 It was contended that there is absence of external injury, but there is no material to indicate any violence. The deceased claims to have been raped by three persons by gagging her mouth and she may have been overpowered. It cannot be overlooked that the deceased jumped into water and she must have remained in water for quite some time and, therefore, absence of other external injury will not strengthen the case of the defence in any manner.

17.5.1 Absence of semen on person of the deceased also gets explained by the fact that the lady had jumped into water and must have remained in the water for quite some time and, therefore, this contention also does not appeal to us.

17.5.2 The next contention regarding medical evidence was that the bangles are found to be intact. The Inquest Panchnama indicates that the bangles were of plastic and, obviously, in absence of heavy force, cannot be expected to break. There is no material to indicate that they were not de-shaped. No presumption can be drawn in that regard. If the deceased was wearing glass bangles and if they were broken, they would not be found on person of the deceased. In any event, this does not carry the defence case any further.

17.6 Lack of medical examination of the accused would not be a factor in favour of the accused in face of so much of positive evidence showing his involvement in the crime.

17.7 It was contended that the dead body was identified for the first time at 11.00 P.M. on the day of the incident, whereas the postmortem notes carry name of the deceased and the postmortem was performed at 6.00 P.M. It was contended that this is suggestive of improper and faulty investigation. On examination of the postmortem notes (Ex.18), it is noticed that when the notes were prepared, they were in respect of an unknown female. But, subsequently, name of Anjana, wife of Nilesh is added on basis of Police Yadi and, therefore, the initial doubt raised about the investigation is not worthwhile an acceptance.

17.8 It was contended that the Yadi with which the dead body was sent for postmortem and the Yadi with which the name was indicated are not brought on record and,

therefore also, it is a matter of doubt whether the medical evidence and the postmortem are genuine. Here also, this objection is raised, for the first time, here before this Court. No objection is raised and no questions are put in this regard to any of the witnesses at the trial. It is only a thought out deference. It cannot outweigh the positive evidence.

17.9 As regards non-examination of material witnesses, namely, the parents and children of the deceased, neighbours, witness-Babu Arjan, who rescued the deceased and the doctor, who gave initial treatment to the deceased, it may be noted that the Purshis filed by the prosecution while closing the evidence clearly indicates that because of a complaint filed by the father of the deceased, the in-laws of the complainant are not likely to support the prosecution case and then it is indicated that the prosecution proposes to close the evidence. This Purshis was shown to the defence and the defence has raised no objection to non-examination of any of the witnesses. It was contended that, what was the condition of the deceased when she was taken to the hospital would be an important factor. Whether she was in a position to speak or not and whether she gave any information on the cause of her jumping into Kankaria or any nexus about rape would be relevant factor. That could have been brought on record by the prosecution by examining these witnesses. It sounds very legitimate, rational and attractive, but it is a matter of record that when the deceased was taken out of water by witness-Babu Arjan, she was not in a position to speak, though conscious. It is also a matter on record that when P.S.I.-Naranbhai Rohit (Ex.61) visited the hospital, he found the deceased to be unconscious and unable to speak and the deceased has expired around 12.30 P.M. If these three pieces of evidence are viewed collectively, they would indicate that the deceased was not in a position to speak till she died and, therefore, she could not have given any dying declaration or could have given any information on rape or cause for her suicide. Therefore, non-examination of these material witnesses does not weaken the prosecution case in any manner, when the prosecution is able to establish the case against the accused on the basis of other independent evidence.

17.10 It was contended that the prosecution story is not believable, if the time factor is taken into consideration. It was contended that, if the evidence of Nilesh (Ex.8) and Dattatrey (Ex.9) is seen, it would indicate that the alleged incident of rape could not have occurred at the time when it is alleged to have occurred.

17.10.1 Nilesh (Ex.8) stated that, he left the house at 9.30 A.M. Till he left the house, admittedly, the incident has not occurred. Dattatrey (Ex.9) states that he went to the house of the deceased at 9.00 A.M. It is, therefore, contended that when Dattatrey went to the house, Nilesh would have been present in the house, but that is not coming out of the prosecution evidence. According to Dattatrey, he remained in the house of the deceased for some time, had a cup of tea, took some rest and then went to the house of Dinesh. Soon thereafter, Amit, son of Nilesh and the deceased, came to him saying that his mother has gone to purchase vegetables. There is evidence to indicate that the deceased was rescued from Kankaria at about 10.30 A.M. It is, therefore, contended that, if Nilesh left the house at 9.30 A.M. and Dattatrey reached the house after Nilesh had gone from the house and remained there for some time by taking tea and then went to Dinesh's house, the incident could not have occurred between 9.30 and 10.15 A.M. Although this contention sounds very logical and attractive, we may note that this is an attempt to contradict and falsify one witness with the deposition of another which is not permissible. It also cannot be overlooked that exact timings cannot be expected to be noted and narrated. The house of Nilesh and Dinesh are in the same locality and are at a walkable distance of few minutes and the difference in the timings indicated can be for several factors like inaccuracy in giving timings, difference in watches, standard of education, etc. This difference in timing, in our opinion, is not strong enough to outweigh the other weighty and cogent evidence in the form of dying declaration and the subsequent action of the deceased and, in our opinion, therefore, not much weightage can be given to the time factor. It is a matter of record and fact that, after Dattatrey left the house, his grandson, Amit, followed him and, thereafter, when the wife of Dattatrey went to the house of the deceased, she found deceased absent and noticed the writing on the wall, whereafter, the deceased was rescued from Kankaria. The dying declaration alleges rape against the accused and two of his associates supported by medical evidence, leading us to a legitimate conclusion that the incident of rape occurred around the time suggested by the prosecution.

17.11 The last contention was regarding conspiracy hatched by the complainant's side against the accused. It was contended that a contradictory version is given regarding the relationship between the accused and the complainant. On the one hand he says that they are

friends and have a relationship of taking coffee together and, on the other hand, it is indicated that they are not known to each other. It was contended that the writing on wall is more aimed at prosecuting and punishing accused rather than anything else and, therefore, the whole case is outcome of a conspiracy. We are not in a position to accept this contention for the reason that no conspiracies are hatched for losing life. When a deceased implicates the accused of rape and indicates that she is committing suicide, there is no reason to doubt her version. The writing about punishing the accused or prosecuting him is a natural outburst of an outraged female. It is reflective of the mental trauma and set of mind of the deceased leading her to commit suicide. It would also be appropriate to note at this stage that there is evidence uncontroverted and unchallenged of Dattatrey and Dinesh to the effect that the accused used to make passes at the deceased and tease her and because of this conduct of his, the complainant was required to shift his residence a few months prior to the incident and, therefore, the contention regarding conspiracy is difficult to be accepted.

17.12 Last but not the least, we would like to refer to a report by the Scientific Officer of F.S.L. on lie detection test, which is at Ex.21. That lie detection test performed on polygraph is in respect of accused, witness-complainant-Nilesh, and his brother-Dinesh. The report indicates that the tests performed of Nilesh and Dinesh did not indicate any trace of falsehood, whereas the test on the accused indicated that the answers given by him were doubtful.

18. In view of the foregoing discussion, we are not in a position to accept any of the contentions raised by learned Advocate for the appellant.

19. Reliance was placed on decision of the Apex Court in the case of Magan Bihari Lal v. State of Punjab, AIR 1977 SC 1091. In that decision, it has been held that the expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. It is unsafe to base a conviction solely on expert opinion without substantial corroboration. This decision cannot help the appellant for the reason that, as discussed above, apart from the writing on wall, there are circumstances and material evidence to connect the accused with the crime.

19.1 Reliance was placed on decision of the Supreme Court in the case of Rahim Beg v. State of U.P., AIR

1073 SC 343, where it was held that where a rape was allegedly committed by a fully developed man on a girl of 10 to 12 years of age, who is virgin and whose hymen is intact and where there is absence of injuries on the male organ of the accused, it would indicate innocence of the accused. In the instant case, none of such factors are present and, therefore, the decision will not be applicable to the facts of the present case.

19.2 Similarly, decision in the case of Dilip & another v. State of M.P., AIR 2001 SC 3049, relied upon by the learned Advocate for the appellant also cannot help the appellant. In that case, the version of the prosecutrix of narration of the incident was found to be contradictory to the statement made by her before her Aunt and the medical evidence and the F.S.L. report were not found to be supporting and it was held that the accused would be entitled to acquittal. The facts in the instant case are different and the decision cannot help the accused.

19.3 Reliance was first placed on the decision in the case of Bhargav K. Salunkhe v. State of Maharashtra, 1996 Cri. L.J. 1228, where a Division Bench of the Bombay High Court took a view that evidence of handwriting expert must be looked into with caution. Consistent dissimilarities in the general features of disputed writing and admitted signature and handwriting, if noticed, will make the opinion of the expert that the disputed handwriting tallied with the specimen handwriting unsustainable. As discussed above, we have found that there is no inconsistency in the admitted writings and the writings on the wall and we do not find any reason to doubt the opinion of the expert. The decision, therefore, cannot help the appellant.

20. In view of the foregoing discussion, Criminal Appeal No.374 of 2000 by the accused does not merit acceptance and must fail. The appeal stands dismissed. The judgment and order of conviction and sentence recorded by the Trial Court is hereby confirmed.

21. So far as the State Appeal is concerned, it is for enhancement of the sentence. Learned Additional Public Prosecutor was not in a position to indicate as to how the learned Judge has committed an error in awarding sentence. We have gone through the judgment and the order part. We find that the learned Judge has considered all relevant factors and has used his judicial discretion and has awarded the sentence set out by law and, therefore, we would not like to interfere with the

discretion used by the learned Judge in a judicious manner. The said appeal also, therefore, must fail and the same is dismissed.

[KSHITIJ R. VYAS, J.]

[A. L. DAVE, J.]

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